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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KARL EUGENE FAIRMAN,

Defendant and Appellant.

D059732

(Super. Ct. No. SCN260006)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed as modified and with directions.

After waiving his right to a jury trial, the trial court found Karl Eugene Fairman guilty of possession of a deadly weapon (e.g., metal knuckles) in violation of former Penal Code¹ section 12020,² subdivision (a)(1). The trial court also found Fairman

¹ Unless noted otherwise, all statutory references are to the Penal Code.

² Section 12020 and its subdivisions were continued *without* substantive change in section 16000 et seq., effective January 1, 2012. (38 Cal.L.Rev.Comm. Reports (2009) p. 217.) In connection with possession of "metal knuckles," the current operative provisions are sections 16920, which define "metal knuckles" (discussed *post*) and 21810, which

suffered six prior "strike" convictions (§§ 667, subds. (b)-(i) & 1170.12), struck five of those prior strike convictions and sentenced him to eight years in state prison.

Fairman initially requests this court review the confidential reporter's transcript from the in-camera hearing held pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) and determine whether the trial court properly exercised its discretion in finding there was nothing relevant to disclose in the personnel file of one of the sheriff's deputies involved in his parole search and arrest.

Fairman next contends (i) the trial court erred when it denied his motion to suppress evidence pursuant to section 1538.5; (ii) in any event, there is insufficient evidence in the record to support his conviction for possession of a deadly weapon because the items found in his possession do not qualify as "metal knuckles" within the meaning of former section 12020, subdivision (c)(7); and (iii) the trial court erroneously imposed sentence on two prior prison terms when Fairman suffered only one prior prison term.

As we explain, our independent review of the transcript of the in-camera hearing shows the trial court did not abuse its discretion in finding there were no personnel records subject to disclosure under *Pitchess*. As we further explain, Fairman's sentence should be adjusted to reflect only one prior prison term. In all other respects, the judgment of conviction is affirmed.

addresses the punishment for, among other things, possession of "metal knuckles." Section 21810 also continues former section 12020, subdivision (a)(1) without substantive change. (38 Cal.L.Rev.Comm. Reports (2009) p. 217.)

DISCUSSION

*A. Events Leading Up to Fairman's Arrest*³

About 1:30 a.m. in early April 2009, San Diego County Sheriff's Deputies responded to a call in Vista, California, regarding suspicious activity near a motor home parked close to an apartment complex. Deputy Kenneth Seel arrived first to the scene and contacted a man matching the description given by dispatch. That individual was later identified as Timothy Hurlbut, the registered owner of the mobile home. Deputy Seel testified the hood on the motor home was open, and he had previously seen the motor home in the area while on patrol.

As Deputy Seel was assessing the situation, he noticed an individual later identified as Fairman about 10 feet away, walking towards him. Fairman also matched the description provided by dispatch. After Deputy Seel confirmed Fairman and Hurlbut knew each other, Deputy Seel, who was then joined by Deputy Andy Julian, detained Fairman. In response to Deputy Seel's question whether he was on probation or parole, Fairman told the deputies he was a "290 registrant" and on probation with a "4th waiver," or words to that effect.⁴

As a result of the Fourth waiver, Deputy Seel searched Fairman. Deputy Seel testified the search "was a little bit more [extensive] than a pat down [search] [and] a

³ This summary is taken from evidence presented at the hearing on Fairman's motion to suppress.

⁴ Deputy Seel explained at trial that a "290 registrant" means a person who must register pursuant to section 290 (e.g., the Sex Offender Registration Act, § 290 et seq.).

plittle bit less [intrusive] than a full blown search." Deputy Seel noticed that Fairman was wearing gloves but did not search them or ask Fairman to remove them.

Deputies Laura Cantu and Thomas Byrne also responded to the call. Deputy Byrne spoke to two of the reporting parties, Christina Gonzalez and Philip Perez, who Deputy Byrne described as "panic stricken." Deputy Byrne testified that Gonzalez and Perez reported that as they were leaving the apartment complex and walking toward Perez's car parked near the motor home, they saw two men wearing dark clothes run inside the motor home, without bothering to close the door. Perez told Deputy Byrne they ran back to the apartment complex and called police, as they were afraid of being assaulted or attacked by the men. While talking to Deputy Byrne, Gonzalez and Perez identified Fairman and Hurlbut as the men they had seen run inside the motor home.

Deputy Byrne next conducted a cursory search of the motor home for people or contraband, but found nothing in plain view. Deputy Byrne testified he stopped the search after Hurlbut objected. Deputy Byrne then directed Deputy Seel to evaluate Fairman for being under the influence of a controlled substance and to question him about his sex offender registration status. Deputy Seel determined Fairman showed no signs of being under the influence.

At or near this time, Deputy Cantu confirmed through dispatch that Fairman had a valid Fourth Amendment search waiver as a condition of probation for drug possession⁵ and that in 1987, Fairman committed a burglary in an area near San Diego State

⁵ The trial court took judicial notice of Fairman's Fourth Amendment search waiver from San Diego County Superior Court case No. SCN257374.

University where he held two women at knifepoint and forced one of them to orally copulate him. In light of this information, and the fact that Deputy Byrne knew the area where the motor home was parked was a high crime area, Deputy Byrne testified he believed Fairman was in possession of drugs and possibly at that location to commit an assault.

As dispatch, with the help of other law enforcement, was confirming where Fairman lived for purposes of his section 290 registration requirement, Deputy Byrne conducted another search of Fairman (second search). Deputy Byrne requested that Fairman take off his shirt because while Fairman had been sitting, Deputy Byrne saw that Fairman was wearing underneath his shirt two tight-fitting camisoles typically worn by women as undergarments. Deputy Byrne testified he also directed Fairman to remove the undergarments because in his experience in law enforcement, people tend to hide contraband inside tight fitting clothes like those Fairman was wearing. The deputies also searched Fairman's shoes and socks and his hat, but found nothing.

Deputy Byrne testified that he became suspicious of Fairman while Fairman was removing what Deputy Byrne described as "leather weightlifting gloves." Specifically, Deputy Byrne testified he saw Fairman "meticulously pick[] off each finger" as Fairman was removing the gloves and then toss them to the ground in a "Frisbee[-like]," "gent[le] manner." When Deputy Byrne searched the gloves, he found a metal rod inside each glove. Deputy Byrne placed Fairman under arrest for possession of a deadly weapon.

B. *Pitchess* Motion

Prior to trial, Fairman made a motion to discover any evidence of alleged misconduct in the personnel records of Deputies Seel, Julian, Cantu and Byrne. The trial court found Fairman made a showing of good cause as it related to Deputy Byrne, reviewed that deputy's personnel records in camera and found no discoverable complaints.

Evidence contained in a law enforcement officer's personnel file may be relevant to an accused person's criminal defense. (See *Pitchess*, *supra*, 11 Cal.3d at p. 537.) Accordingly, on the defendant's showing of good cause the custodian of records is required to produce in court all documents potentially relevant to the defendant's motion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) Because the officers in question have a strong privacy interest in their personnel records, a neutral trial judge next examines the records in camera and orders produced only those found to be relevant and otherwise in compliance with statutory limitations are disclosed. (*Ibid.*)

We independently review the transcript of the *Pitchess* hearing to determine whether the trial court abused its discretion in refusing to disclose the deputies' personnel records. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992.)

We have reviewed the sealed record of the *Pitchess* hearing, which was submitted pursuant to the parties' stipulation as set forth in this court's June 20, 2012 order. Based on our review of the hearing transcript, we conclude the trial court did not abuse its discretion when it denied Fairman's *Pitchess* motion.

*C. Refusal to Suppress the Alleged "Metal Knuckles"*⁶

1. Additional Background

Fairman moved to suppress the metal rods, or what he describes as a "sap," pursuant to section 1538.5. Fairman contended the detention was unlawful and the second search of his person was arbitrary and capricious.

The trial court denied the motion to suppress, finding that the initial detention of Fairman was proper and the second search of Fairman by Deputy Byrne was not arbitrary or capricious and was not conducted for the purpose of harassment.

Specifically, as to the detention⁷ it found:

"Deputy Seel received a radio call to a particular location. He's familiar with the location. He's actually—to a certain degree familiar with the vehicle or at least what he believes to be the same vehicle. And in early hours of the morning he arrives to see the vehicle there, the hood up, nobody underneath. I don't disagree it's consistent with doing repairs. It's equally consistent with a [section] 10851. Someone trying to hotwire it. And a person nearby who matches the general description, who ends up being Mr. Hurlbut . . . so it's clear to me that Deputy Seel at that time should follow up on the radio call and contact the individual. [¶] In doing so the defendant is walking in that direction.

⁶ We say "alleged" because as discussed *post*, Fairman challenges the finding of the trial court that there was sufficient evidence he possessed "metal knuckles" within the meaning of former section 12020, subdivision (a)(1).

⁷ On appeal, Fairman contends only that the search was arbitrary and capricious and undertaken for the purpose of harassment. In any event, as we discuss *post* we nonetheless conclude substantial evidence in the record supports the trial court's finding that the detention of Fairman was reasonable.

And as I recall Deputy Seel saying he also matched the description. He wasn't specific as to the specific code. He said he just matched the description. And he said, [']Do you know this guy?['] And he's—he meaning [Fairman] says, [']Yes.['] He says, ['H]ave a seat.['] I think that's clear under *Terry v. Ohio* (1967) 392 U.S. 1 (88 S.Ct. 1868)] it's appropriate to detain to fully investigate what's going on. Is there a crime as it relates to the motor home? What's happening? All right. So that's the detention. The initial detention. [¶] Within minutes thereafter, if not seconds thereafter [Fairman] says, [']I'm 290. I'm [a Fourth waiver].['] And I think Deputy Seel in good faith while he's in the process or someone is in the process of checking [the Fourth waiver] can continue to detain to find out. I think the detention part is okay."

With regard to the second search, the trial court found and reasoned as follows: "We're now really talking about the search conducted by Deputy Byrne [and] not [the search conducted] by Deputy Seel because Deputy Seel didn't find anything. [¶] With the [Fourth] waiver the defendant has given up the majority of his rights as relates to being searched and seized for that matter but searched as relates to in this case. Unless it's done for arbitrary reason or capricious reason or purposes of harassment. [¶] So prior to Deputy Byrne starting the search, which is take your shirt off, take the camisoles off, take your shoes, socks, hat off, prior to his doing that, what did Byrne know? One, he responded to the same call as Seel did. I already said that's sufficient grounds to detain. So there's some potential criminal activity as relates to the motor home. [¶] Two, he talks to the two people who made the initial call that resulted in the radio call, and they say the two guys over there are the guys we called about. So now, we have a nexus between the

original call and the suspicious activity and Mr. Hurl[but] and [Fairman]. And he knows—learns through the O.N.S. [Officer Notification System] that's what it's called. The O.N.S. is circumstances of [Fairman's] registration and the circumstances of that offense. [¶] Now, here's probably where you and I, [defense counsel] differ a little bit. [¶] I think once they know those facts, which at least is recited by both Deputy Seel and Deputy Byrne, were relatively egregious. That's sufficient reason to look a little harder. That alone doesn't make it harassing. There's no evidence that either Deputy Seel or Deputy Byrne knew [Fairman], had prior experience with [Fairman], some beef to grind with [Fairman]. They know—now granted before that's done they know there's nothing related to the motor home, there's nothing related to him being [under the influence of a controlled substance] . . . but in what—at least sounded to me when I had him go through the chronology a relatively continuous sequence of events, no obvious effort to delay, following up on what occurred, and why he thought [Fairman] may be committing some crime. In this case it's clear that Deputy Byrne believed he was potentially in possession of drugs. [¶] It seems to me that with the [Fourth] waiver, the time frame involved, and the underlying circumstances it's not arbitrary. He was provided sufficient facts from my analysis that would justify conducting a [Fourth] waiver search. It's likewise not capricious, and I don't find grounds to make it harassing. [¶] Now, I think those facts will be different had the circumstances of his prior record not been known that would then allow the deputy to make some of the leaps or plans he did."

2. *Governing Law*

"An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review." (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; see also *People v. Ayala* (2000) 23 Cal.4th 225, 255.)

All presumptions favor the trial court's exercise of its power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence, and draw factual inferences, " 'and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.' " (*People v. Leyba* (1981) 29 Cal.3d 591, 596–597.)

The Legislature has authorized convicted criminals be granted probation to promote rehabilitation and reduce recidivism. (§ 1203.1.) The Legislature has also

authorized convicted criminals be required to agree to reasonable conditions before granting probation. (*People v. Bravo* (1987) 43 Cal.3d 600, 608; *People v. Lent* (1975) 15 Cal.3d 481, 486.) One such condition is a probationer's waiver of his or her Fourth Amendment rights "in exchange for the opportunity to avoid serving a state prison sentence." (*People v. Reyes* (1998) 19 Cal.4th 743, 749.) " '[A]n adult probationer subject to a search condition may be searched by law enforcement officers having neither a search warrant nor even reasonable cause to believe their search will disclose any evidence.' [Citation.]" (*Ibid.*) "[T]he purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches." (*Id.* at p. 753.)

In determining whether a search incident to a Fourth waiver is reasonable, a reviewing court considers the totality of the circumstances known to the officer or officers and balances the intrusion of the search on the suspect's privacy, on the one side of the scale, with the need for such intrusion to promote legitimate government interests, on the other side. (*People v. Smith* (2009) 172 Cal.App.4th 1354, 1360.)

A Fourth waiver or "probation search" is not unlimited: "A waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons." (*People v. Bravo, supra*, 43 Cal.3d at p. 610; see also *People v. Medina* (2007) 158 Cal.App.4th 1571, 1576 ["A probationer's consent is considered 'a complete waiver of that probationer's Fourth Amendment rights, save only his [or her] right to object to harassment or searches conducted in an unreasonable manner.' "].)

A search is arbitrary and capricious when the motivation for it is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes, or when it is motivated by personal animosity toward the probationer. It must be reasonably related to the purposes of probation. (See *People v. Robles* (2000) 23 Cal.4th 789, 797; see also *People v. Bravo*, *supra*, 43 Cal.3d at pp. 610-611.)

In addition, a search could become unconstitutionally unreasonable if conducted too often or at an unreasonable hour, or if unreasonably prolonged, or if conducted for other reasons establishing arbitrary or oppressive conduct by the searching officer. (See *People v. Reyes*, *supra*, 19 Cal.4th at pp. 753-754.) Finally, the officer must be aware of the search condition before conducting the search; after-acquired knowledge will not justify the search. (See *People v. Sanders* (2003) 31 Cal.4th 318, 335.)

3. *Analysis*

Fairman claims that Deputy Byrne's decision to conduct a second search was not motivated by legitimate law enforcement concerns but instead by Deputy Byrne's "personal animus against [Fairman], who he perceived to be at the scene to either kidnap or assault someone, based on nothing more than wild, unfounded and unsubstantiated speculation by hysterical young people and the fact that, more than 20 years earlier, [Fairman] committed a horrible sexual assault (for which he was convicted and duly punished)."

Here, we independently conclude the second search of Fairman by Deputy Byrne was for legitimate law enforcement purposes, viz. to search for drugs (e.g., "dope") that Deputy Byrne believed was on Fairman's person. Indeed, the record shows that Deputy

Byrne's search of Fairman occurred *after* dispatch informed the officers that Fairman's Fourth waiver in exchange for probation was based on a drug offense and *after* Deputy Byrne observed Fairman wearing two tight fitting camisoles underneath his shirt, which, based on Deputy Byrne's experience and training, and given the high crime area where the motor home was parked, the late hour of the contact and the fact witnesses had identified Fairman as one of two men who ran inside the motor home and left the door open, raised Deputy Byrne's suspicions that Fairman was in possession of drugs. (See *People v. Robles*, *supra*, 23 Cal.4th at p. 796 [noting that "[i]n the context of probation searches, . . . the question is whether the circumstances, viewed objectively, show a proper probationary justification for an officer's search"].)

In addition, the record shows that Deputy Byrne was busy speaking with Gonzalez and Perez during the initial search of Fairman conducted by Deputy Seel, which Deputy Seel described as a search that "was a little bit more [extensive] than a pat down and a little bit less [intrusive] than a full blown search." In light of the fact that Deputy Byrne was busy during the first search of Fairman, that the first search was not thorough by all accounts and was essentially a search for weapons for the protection of the deputies, and that the deputies were unaware at the time of the first search of the reason for Fairman's Fourth waiver, we conclude from the totality of the circumstances known to Deputy Byrne at the time of the second search that the trial court properly applied the law in finding it was reasonable for Deputy Byrne to conduct a second, more thorough search of Fairman and that the trial court's finding is supported by substantial evidence in the record.

Finally, we conclude the second search of Fairman was not unnecessarily prolonged by the deputies. (See *People v. Reyes*, *supra*, 19 Cal.4th at pp. 753-754 [noting " 'a parole search could become constitutionally "unreasonable" if made too often, or at an unreasonable hour, of if unreasonably prolonged . . . ' [Citation]."].) Indeed, the record shows the deputies initially were concerned with whether Fairman and Hurlbut were vandalizing cars, including the mobile home they went inside. Next, when the deputies learned Fairman was a registered sex offender, they contacted dispatch and took steps to verify Fairman's registration address.

Lastly, as noted *ante* the deputies conducted a thorough probation search of Fairman once they learned he was on probation for a drug offense and after Deputy Byrne saw Fairman wearing tight fitting women's undergarments.

The record thus supports the findings of the trial court that the entire encounter was a "relatively continuous sequence of events" that lasted about 46 minutes, and that the deputies made "no obvious effort to delay" the detention and/or searches of Fairman. We thus conclude this evidence supports the finding that the search was not unnecessarily prolonged and was conducted for legitimate police objectives.

D. *Substantial Evidence Supports the Finding Fairman Possessed "Metal Knuckles"*⁸

Fairman next contends there is insufficient evidence in the record to support the finding of the trier of fact that he possessed "metal knuckles" within the meaning of subdivision (c)(7) of former section 12020.

When an appellant challenges the sufficiency of the evidence on which a judgment is based, our task is to " 'review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Perez* (2010) 50 Cal.4th 222, 229.)

In assessing the sufficiency of the evidence, a court of review does not "resolve conflicts in the evidence, or reevaluate the credibility of witnesses" (*People v. Riazati* (2011) 195 Cal.App.4th 514, 532), or reweigh the evidence already evaluated and considered by the jury. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 711 [noting that a

⁸ In analyzing this issue, unlike the motion to suppress we are not limited to record evidence known by the officer or officers at the time of the alleged unlawful search. (See *People v. Smith, supra*, 172 Cal.App.4th at p. 1360.)

" 'substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence . . . upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question,' " and noting that " '[o]nce such evidence is found, the substantial evidence test is satisfied . . . [e]ven when there is a significant amount of countervailing evidence' "].)

Former section 12020 provided in relevant part: "(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison: [¶] (1) [P]ossesses . . . any metal knuckles "

Former subdivision (c)(7) of section 12020 defined "metal knuckles" to mean "any device or instrument made wholly or partially of metal which is worn for purposes of offense or defense in or on the hand and which either protects the wearer's hand while striking a blow or increases the force of impact from the blow or injury to the individual receiving the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs which would contact the individual receiving a blow."

Here, Fairman claims there is insufficient evidence he possessed "metal knuckles" within the meaning of former section 12020, subdivision (c)(7) because, although there was evidence that the "four separate items" found on Fairman, "if combined together with some manual manipulation, could be *used* to the same effect [as] a weapon [citation], there was no evidence that Fairman possessed a 'device or instrument made wholly or partially of metal' that can be worn 'in or on the hand.' [Citation.]"

To resolve this issue, we turn "first to the words of the statute, giving them their ordinary meaning." (*In re David V.* (2010) 48 Cal.4th 23, 27.) " 'If the statutory language is clear and unambiguous, then we need go no further.' [Citation.] If, however, the language supports more than one reasonable construction, we may consider 'a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citation.] Using these extrinsic aids, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' " (*People v. Sinohui* (2002) 28 Cal.4th 205, 211–212.)

In enacting former section 12020, the Legislature "sought to outlaw the classic instruments of violence and their homemade equivalents; the Legislature sought likewise to outlaw possession of the sometimes-useful object when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless purpose." (*People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. omitted.)

Here, the record shows when Deputy Byrne examined Fairman's gloves he noticed they were heavy and there was something cylindrical inside each glove. In the first glove he examined, Deputy Byrne saw with his flashlight a "shiny piece of metal" that had been sitting across the finger portion of the glove. When Deputy Byrne examined the second

glove, a metal rod fell out of one of the finger holes. We conclude this evidence is sufficient to establish the gloves were made "partially of metal" within the meaning of subdivision (c)(7) of former section 12020.

The next issue is whether the gloves with the metal rods were "worn . . . in or on the hand" either to "protect[] the wearer's hand while striking a blow or [to] increase[] the force of impact from the blow or injury to the individual" receiving it. (Former § 12020, subd. (c)(7).) San Diego County Deputy Sheriff Robert Cross testified as an expert on weapon identification. Cross reviewed the police reports and Fairman's gloves and opined they qualified as "metal knuckles."

Cross explained that both gloves allowed for the insertion of a metal rod near the upper palm of the hand; that each metal rod was a little smaller than a roll of dimes; that once the gloves were on the hands, the metal rod could be inserted inside the palm portion of the glove; and that when worn in such a manner, the gloves increased the force of impact from a blow due to the added weight of the metal rod. He opined that with the metal rod snugly inside the glove, the rod would also protect the wearer's hand when a blow was struck because it would allow the wearer to make a tighter fist.

Finally, Cross testified that without the metal rods, the gloves worn by Fairman appeared to be "regular" weight lifting gloves and would not constitute a weapon. However, with the metal rods inside the gloves, Cross testified the gloves could be used in a variety of ways as weapons, including to deliver closed-fist strikes in a traditional manner, to deliver hammer-fist strikes or open-handed strikes; or if the rods were inserted near the inner portion of the hand, to "smack or slap" a person.

We conclude this evidence is reasonable, credible and of solid value (see *People v. Steele, supra*, 27 Cal.4th at p. 1249) and that a reasonable fact finder could find Fairman's gloves—with the metal rods inside of them—were "worn . . . in or on the hand" (see former § 12020, subd. (c)(7)) either to protect Fairman's hand when striking a blow and/or to increase the force of impact from the blow or injury to the individual receiving it. (See *ibid.*)

We further conclude the recent Supreme Court decision of *In re David V., supra*, 48 Cal.4th at page 23 supports our conclusion in the case at bar. There, our high court held that an ordinary bicycle footrest found in defendant's pocket did not constitute "metal knuckles" within the meaning of the statute because it could *not* be worn in or on the hand. (*Id.* at p. 30.) In reaching its decision, the court found items that are not somehow attached to the hand, but instead "merely grasped in it," are not "worn . . . in or on the hand" within the meaning of former section 12020, subdivision (c)(7). (*Id.* at p. 27.)

Here, if Fairman merely had the metal rods in his pocket and no gloves, then his case would be similar to the facts in *In re David V.*, as merely grasping the metal rods—without more—would be similar to the minor in *In re David V.* grasping a bike footrest, a "roll of coins" or "batteries" when throwing a punch. (See *In re David V., supra*, 48 Cal.4th at p. 30.) However, because the metal rods were located *inside* Fairman's gloves, we conclude the instant case is distinguishable from the facts of *In re David V.* and satisfies the statutory definition of a device "worn . . . in or on the hand" in former section 12020, subdivision (c)(7).

That Fairman described the gloves and metal rods as "four separate items" does not change our conclusion. It was a question of fact for the fact finder (e.g., the trial court) whether the objects were simply separate, harmless items as Fairman contends or were in fact a dangerous weapon, in this case "metal knuckles" within the meaning of former section 12020, subdivision (c)(7).

In addition, the record shows that Fairman in 1986 was arrested for possession of "metal knuckles" in violation of former section 12020, subdivision (a), after he was found wearing a heavy chain mail glove on his right hand and admitted to police he wore the metal glove to hit people "in case anybody messe[d] with" him.⁹ Although a defendant's specific intent to use an object as a weapon is not an element of former section 12020 (see *People v. Rubalcava* (2000) 23 Cal.4th 322, 330-331; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404), we conclude Fairman's prior conviction for possession of metal knuckles in violation of this statute nonetheless supports the finding of the trier of fact that Fairman's gloves with the metal rods inside were a deadly weapon and not merely innocent objects on his person. (See *People v. King* (2006) 38 Cal.4th 617, 624 [noting that once the prosecution establishes the defendant possessed an object, which could have ordinary uses, as a deadly weapon within the meaning of [former] section 12020, the burden then shifts to the "defendant to show that possession of the weapon was for an innocent purpose."].)

⁹ Fairman does not challenge on appeal the admissibility of this prior offense.

E. Sentencing Error

Finally, Fairman contends, and the People agree, that the trial court erred by imposing sentence on two prior prison term enhancements because the court found Fairman had only served one prior prison term. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1203 [concluding that when a defendant has had multiple prior felony convictions, but has served only one prison term, only one sentence enhancement is appropriate pursuant to section 667.5, subdivision (b)].)

Although Fairman was convicted of multiple prior felonies in two prior felony cases, he only served one prison term because his sentences ran concurrently. (See *People v. Jones* (1998) 63 Cal.App.4th 744, 747 ["Courts have consistently recognized that [the statutory language of section 667.5, subdivisions (b), (e) and (g)] means that only one enhancement is proper where concurrent sentences have been imposed in two or more prior felony cases. [Citations.]".]) In such instances, the proper remedy is to modify a defendant's sentence by striking one of the enhancements imposed under section 667.5, subdivision (b). (*People v. Riel, supra*, 22 Cal.4th at p. 1203.)

DISPOSITION

Our independent review of the transcript of the in-camera hearing on Fairman's *Pitchess* motion reveals the trial court did not abuse its discretion in denying that motion.

The trial court is directed to modify Fairman's sentence to strike one of the two, 1-year enhancements it imposed pursuant to section 667.5, subdivision (b) because Fairman served only one prison sentence for his prior felony convictions. The trial court also is

directed to amend the abstract of judgment accordingly and forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment of conviction is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.